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NOT FOR PUBLICATION

JAN 24 2008

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

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CLERK, U.S. DISTRICT COURT
ANCHORAGE, ALASKA

UNITED STATES OF AMERICA,

No. 07-30172

Plaintiff - Appellee,

D.C. No. CR-04-00033-JWS

v.

MEMORANDUM*

JOHNNY LEE NAPIER,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Johnny Lee Napier appeals from the restitution order imposed for fraudulently obtaining, converting, and misapplying federal grant funds in violation of 18 U.S.C. § 666(a)(1)(A). We have jurisdiction pursuant to

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

28 U.S.C. § 1291, and we affirm.

Napier contends that his restitution order should be vacated and the case remanded because his attorney was ineffective by failing to object to the fact that the district court used dismissed counts to calculate the amount of restitution owed. Because the record is not sufficiently developed, we decline to consider this issue on direct appeal. *See United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003).

AFFIRMED.